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No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1989

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

ELIZABETH STROOP, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether Social Security child's insurance benefits, paid under 42 U.S.C. 402(d), are "child support payments" within the meaning of an Aid to Families With Dependent Children (AFDC) provision, 42 U.S.C. 602(a)(8)(A)(vi), which requires that the first $50 per month of child support payments be disregarded in determining AFDC eligibility and assistance levels.

PARTIES TO THE PROCEEDINGS

The petitioner is the Secretary of Health and Human Services. The respondents are plaintiffs Elizabeth Stroop, Melissa Lam by her next friend Elizabeth Stroop, Bret Lam by his next friend Elizabeth Stroop, Jamie Stroop by her next friend Elizabeth Stroop, Geneva Powers, Crystal McClanahan by her next friend Geneva Powers, Dorothy Brown, and Robert Lee Turner by his next friend Dorothy Brown, on behalf of themselves and all others similarly situated. The plaintiffs in the district court included Karen B. Carter, Ragene Carter by her next friend Karen B. Carter, Paul Jones, Cory P. Jones by his next friend Paula Jones, and David L. Jones, but they were neither appellants nor appellees in the court of appeals. The Commissioner of the Virginia Department of Social Services was a defendant in the district court and a separate appellee in the court of appeals; this petition does not raise the issue on which the Commissioner was an appellee, and, unlike the Secretary of Health and Human Services, the Commissioner was not an appellant in the court of appeals regarding the issue addressed in this petition.

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v.

ELIZABETH STROOP, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Health and Human Services, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-13a) is reported at 870 F.2d 969. The opinions of the district court (App., *infra*, 14a-22a, 23a-27a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 1989. A petition for rehearing with suggestion for rehearing en banc was denied on May 31, 1989 (App., *infra*, 31a-34a). On August 25, 1989, Chief Justice

Rehnquist extended the time for filing a petition for writ of certiorari to September 28, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Sections 402(a)(7)(A) and (8)(A)(vi), 457(b)(1), and 202(d)(1) of the Social Security Act (42 U.S.C. 602(a)(7)(A) and (8)(A)(vi) (Supp. V 1987); 42 U.S.C. 657(b)(1) (Supp. V 1987); 42 U.S.C. 402(d)(1) (1982 & Supp. V 1987)) are set forth in the appendix (at 35a-39a). Aid to Families with Dependent Children (AFDC) regulations 45 C.F.R. 302.51(b)(1) and 45 C.F.R. 232.20(a) and (d) are set forth in the appendix (at 40a-41a).

STATEMENT

This case concerns the scope of the $50 per month disregard for "child support payments" that Congress has required the States to apply in determining eligibility and assistance levels under the AFDC program.

1. The Aid to Families with Dependent Children (AFDC) program, set forth in Title IV of the Social Security Act (42 U.S.C. 601 *et seq.*), is a cooperative effort by the federal and state governments to provide financial and other assistance on behalf of certain dependent children. For purposes of the AFDC program, a "dependent child" is a needy child who has been deprived of parental care or support by a parent's death, incapacity, or continued absence from the home. 42 U.S.C. 606(a). State participation in the AFDC program is not mandatory, but participating States must follow all applicable federal requirements. Among those requirements are statutory provisions directing the States to consider all income and resources available to the recipient family before determining the need-based amount of AFDC assistance (42

U.S.C. 602(a)(7) (Supp. V 1987)), and provisions specifying various categories of income and resources that are to be "disregarded" in making the determination of an applicant's eligibility (42 U.S.C. 602(a)(8)(A) (Supp. V 1987)). In addition, an AFDC recipient must assign to the State rights of support (42 U.S.C. 602(a)(26)(A) (Supp. V 1987)), including child support payments, and federal law specifies standards and procedures for state recovery of child support payments from noncustodial parents. 42 U.S.C. 651-665.

Child's insurance benefits are provided as part of the Old Age, Survivors and Disability Insurance (OASDI) program, set forth in Title II of the Social Security Act (42 U.S.C. 401 *et seq.*). Child's insurance benefits are available to children if a child's parent was an insured wage earner under the Social Security Act and the insured wage earner has died, become disabled, or retired. 42 U.S.C. 402(d) (1982 & Supp. V 1987). Consequently, child's insurance benefits under Title II are often payable to children who are also members of an AFDC household, including households headed by someone other than the insured parent.

2. In 1984, Congress enacted the Deficit Reduction Act of 1984 (DEFRA), Pub. L. No. 98-369, 98 Stat. 494, a massive statute filling over 700 pages of the statutes at large and including two major divisions, the Tax Reform Act of 1984 and the Spending Reduction Act of 1984. See *Bowen* v. *Gilliard*, 483 U.S. 587, 589 n.2 (1987). As one of its spending reduction provisions, DEFRA amended Title IV of the Social Security Act to require that, in making AFDC eligibility determinations, the income of any sibling or parent living in the same household would be included as part of the AFDC applicant family's income. § 2640(a), 98 Stat. 1145; 42 U.S.C. 602(a)(38) (Supp. V 1987)). In

Bowen v. *Gilliard, supra,* this Court upheld the constitutionality of the family income requirement.

DEFRA also included a provision specifying that $50 per month of "any child support payments" should be disregarded in determining AFDC eligibility and assistance levels;[1] a parallel provision specified that the first $50 per month of support payments received by the

[1]The disregard provision (DEFRA § 2640(c), 98 Stat. 1146) amended the AFDC statute to provide:

> [I]n making the determination under paragraph (7), the State agency—
>
> • • • • •
>
> (vi) shall disregard the first $50 of any child support payments received in such month with respect to the dependent child or children in any family applying for or receiving aid to families with dependent children (including support payments collected and paid to the family under section 657(b) of this title).

42 U.S.C. 602(a)(8)(A)(vi) (Supp. V 1987).

In 1988, Congress further amended this disregard provision (Family Support Act of 1988 (FSA), Pub. L. No. 100-485, Tit. I, § 102(a), 102 Stat. 2346). The current child support disregard provides:

> [I]n making the determination under paragraph (7), the State agency • • •
>
> (vi) shall disregard the first $50 of any child support payments *for such month received in that month and the first $50 of child support payments for each prior month received in that month if such payments were made by the absent parent in the month when due,* with respect to the dependent child or children in any family applying for or receiving aid to families with dependent children (including support payments collected and paid to the family under section 657(b) of this title).

To be codified at 42 U.S.C. 602(a)(8)(A)(vi) (emphasis added to show change from prior statute).

State from noncustodial parents should be passed on directly to the AFDC recipients.[2]

3. The Secretary of Health and Human Services (HHS) promulgated regulations to implement various DEFRA changes in the AFDC program. 49 Fed. Reg. 35,586-35,606 (1984). To implement the family income requirement, the Secretary issued a regulation requiring that an AFDC application for a dependent child include the income of any sibling or parent living in the same household. 49 Fed. Reg. 35,599 (1984); 45 C.F.R. 206.10(a)(1)(vii). To implement the $50 per month disregard for child support payments, the Secretary issued regulations requiring a $50 per month disregard for child support payments received from absent parents. 49 Fed. Reg. 35,599, 35,605-35,606 (1984); 45 C.F.R. 232.20(a)

[2] The pass-through provision provided:

> [T]he first $50 of such amounts as are collected periodically which represent monthly support payments shall be paid to the family without affecting its eligibility for assistance or decreasing any amount otherwise payable as assistance to such family during such month.

DEFRA § 2640(b), 98 Stat. 1145; 42 U.S.C. 657(b)(1) (Supp. V 1987).

In 1988, Congress amended this provision (FSA § 102(b), 102 Stat. 2346) to conform with the 1988 amendment to the disregard provision. See note 1, *supra.* The current pass-through provides:

> *[O]f such amounts as are collected periodically which represent monthly support payments, the first $50 of any payments for a month received in that month, and the first $50 of payments for each prior month received in that month which were made by the absent parent in the month when due* shall be paid to the family without affecting its eligibility for assistance or decreasing any amount otherwise payable as assistance to such family during such month.

To be codified at 42 U.S.C. 657(b)(1) (emphasis supplied to show change from prior statute).

and (d); 45 C.F.R. 302.51(b)(1).[3] However, the Secretary did not issue regulations requiring a $50 per month disregard for any other type of payments, including child's insurance benefits.

4. On June 23, 1986, respondents filed a class action against the Secretary of HHS and the Commissioner of the Virginia Department of Social Services.[4] The named plaintiffs consisted of five families in which at least one child received AFDC benefits and at least one sibling received either child support payments from a noncustodial parent or child's insurance benefits—income which had been excluded from the AFDC eligibility determination before DEFRA's adoption of the family income requirement. Respondents challenged the family unit rule itself as unconstitutional and contrary to various Social Security Act provisions. Compl., C.A. App. 2. However, after the decision in *Bowen* v. *Gilliard*, 483 U.S. 587 (1987), upholding the constitutionality of the family income requirement, respondents voluntarily dismissed their challenge to the family income requirement. App., *infra*, 14a. Respondents then refocused their action as a challenge to the inclusion of child's insurance benefits as "income" for purposes of the family income requirement, and, alternatively, to the exclusion of child's insurance benefits from the $50 per month disregard for "child support payments."

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[3] The disregard and pass-through procedures were recently revised. 54 Fed. Reg. 32,308-32,309 (Aug. 4, 1989); 54 Fed. Reg. 37,870 (Sept. 13, 1989). The Secretary has also determined that an absent parent's spousal support payments are included in the $50 disregard. 53 Fed. Reg. 21,642 (1988).

[4] Although the Commissioner of the Virginia Department of Social Services is technically a respondent, Sup. Ct. R. 19.6, references in this petition to "respondents" refer to plaintiffs.

On December 21, 1987, the district court (App., *infra*, 14a) upheld the Secretary's inclusion of child's insurance benefits as "income" under the family income requirement. The court rejected respondents' contention that inclusion of the child's insurance benefits as income would violate the anti-alienation (42 U.S.C. 407(a) (Supp. V 1987)) and representative payee (42 U.S.C. 408(e)) provisions of Title II of the Social Security Act (42 U.S.C. 401 *et seq.*) and found "no evidence" to suggest that the Secretary's interpretation requiring such inclusion was incorrect. App., *infra*, 18a. The district court went on to hold, however, that, contrary to the Secretary's interpretation, the $50 per month disregard for "child support payments" must apply to child's insurance benefits. The court concluded that "[i]t is contradictory to treat Social Security benefits like child support for the purpose of including them in family income and then in another part of the same statute treat them differently from child support payments for the purpose of excluding a family from a potential $50 rebate." *Id.* at 19a-20a. Recognizing that the Secretary's interpretation was due "considerable deference," the court nevertheless found the Secretary's interpretation to be " 'demonstrably irrational.' " *Id.* at 18a (quoting *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 565 (1980)). On March 4, 1988, the court issued an opinion denying the Secretary's motion to alter or amend the court's decision concerning the scope of the $50 per month disregard for the child support payments. App., *infra*, 23a.

5. The court of appeals (App., *infra*, 1a) affirmed the district court's judgment in its entirety. The court first affirmed the approval of the Secretary's decision to include child's insurance benefits as income under the family income requirement (*id.* at 5a-8a); it noted that, in so ruling, it joined the Eighth, Ninth, and Eleventh Circuits in rejecting plaintiffs' objections to the inclusion. *Id.* at 5a.

The court also affirmed, however, the district court's rejection of the Secretary's determination that the $50 per month disregard for "child support payments" does not include child's insurance benefits. *Id.* at 8a-13a. The court stated that it "perceive[d] no distinction between support derived directly from a father's wages and support provided indirectly through Title II payments." *Id.* at 11a. The court rejected the Secretary's contention that limiting the disregard to payments from absent parents was consistent with a primary purpose of the disregard, as reflected in the purpose of a child support payment disregard adopted in 1974, of encouraging child support payments from absent parents. The court stated that the intent of one Congress could not be inferred from another Congress, and that the AFDC context had changed so much since 1974 that the objective of encouraging payments from absent parents was no longer applicable. The court also stated that this Court in *Bowen* v. *Gilliard*, *supra*, had emphasized a different purpose for the disregard—mitigating the hardship of the family income requirement—and found that this purpose was equally applicable to child's insurance benefits. App., *infra*, 9a-10a.

The court of appeals recognized that its decision on the disregard conflicted with the Eighth Circuit's decision in *Todd* v. *Norman*, 840 F.2d 608 (1988), which had upheld the Secretary's interpretation. See App., *infra*, 11a. Although recognizing that the Eighth Circuit had emphasized the congressional distinction between social security benefits and child support payments, the court found this distinction "too tenuous to support the Secretary's interpretation." *Ibid.* Noting that several States, including Virginia, allow child's insurance benefits to satisfy child support obligations, the court emphasized that child's insurance benefits and parental child support are similar because both are derived from the parent's

earnings. *Id.* at 11a-12a. Finally, the court indicated that the Secretary's "unreasoned distinction raises equal protection concerns" and suggested that rejection of the Secretary's interpretation avoided doubts about its constitutionality. *Id.* at 12a.[5]

REASONS FOR GRANTING THE PETITION

The court of appeals has interpreted a recent congressional enactment in a manner that conflicts with the general statutory usage of the term "child support payments," and totally disregards Congress's subsequent clarification that "child support payments" refer to payments "made by the absent parent." It also rests, at least in part, on wholly unfounded concerns about the constitutionality of excluding child's insurance benefits from the $50 per month disregard. Moreover, its decision directly conflicts with a decision of the United States Court of Appeals for the Eighth Circuit. The issue is of recurring importance to the uniform administration of the AFDC program, and, if the court of appeals' decision is applied nationally, will result in a significant increase in federal and state expenditures. Further review by this Court is therefore plainly warranted.

1. The Social Security Act reflects a pervasive distinction between "child support payments"—which refer to parental payments—and other types of income and resources, including child's insurance benefits. In light of the principle that "a legislative body generally uses a particular word with a consistent meaning in a given context" (*Erlenbaugh* v. *United States*, 409 U.S. 239, 243 (1972)),

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[5] Although the government submitted a post-argument memorandum concerning the FSA 1988 amendment (see note 1, *supra*), contending that it supported the Secretary's position, the court of appeals failed to discuss, or even acknowledge, the 1988 change.

this consistent use of the term "child support payments" to refer to parental payments cannot be squared with the court of appeals' statutory interpretation.

The term "child support payments" figures prominently in Title IV of the Social Security Act (42 U.S.C. 601 *et seq.*), and invariably refers to payments from absent parents. This statutory usage was clear at the time Congress enacted DEFRA. The 1982 version of Title IV (42 U.S.C. 601 *et seq.*) contains more than twenty references to "child support" or "child and spousal support;" in every instance, the reference is to payments from absent parents, and not to child's insurance or other Social Security benefits.[6] Title IV itself is subdivided into several parts. Part D (42 U.S.C. 651-665) addresses "Child Support and Establishment of Paternity" and includes, inter alia, provisions for the "Office of Child Support Enforcement" in HHS (42 U.S.C. 652); establishment of a Parent Locator Service (42 U.S.C. 653); requirements for a state plan for

[6] See 42 U.S.C. 602(a)(27) ("child support"); 42 U.S.C. 602(a)(28) ("child support"); 42 U.S.C. 602(a)(31)(D) ("child support"); 42 U.S.C. 603(b)(2)(C) ("child support collections"); 42 U.S.C. 603a ("child support"); 42 U.S.C. 652(a)(1) ("child support"); 42 U.S.C. 652(a)(7) ("child and spousal support"); 42 U.S.C. 652(a)(10)(B) ("Office of Child Support Enforcement"); 42 U.S.C. 652(a)(10)(C) ("child support"); 42 U.S.C. 652(b) ("child support"); 42 U.S.C. 653(c)(1) ("child and spousal support"); 42 U.S.C. 654 ("child and spousal support"); 42 U.S.C. 654(6) ("child support"); 42 U.S.C. 654(19)(A) ("child support"); 42 U.S.C. 654(19)(B) ("child support"); 42 U.S.C. 656(b) ("child support"); 42 U.S.C. 657(a) ("child support"); 42 U.S.C. 659(a) ("child support"); 42 U.S.C. 659(b) ("child support"); 42 U.S.C. 659(d) ("child support"); 42 U.S.C. 661(b)(3) ("child support"); 42 U.S.C. 662(b) ("child support"). The 1982 version of Title IV also contains several references to "support payments" and "support obligations" that clearly refer only to payments from absent parents. See 42 U.S.C. 602(a)(26)(B) ("support payments"); 42 U.S.C. 651 ("support obligations"); 42 U.S.C. 653(a) ("support obligations"); 42 U.S.C. 654(5) ("support payments").

"child and spousal support" (42 U.S.C. 654); provisions for enforcement of an individual's legal obligation to provide "child support" or make alimony payments (42 U.S.C. 659); and a grant of authority for civil actions to enforce "child support" obligations (42 U.S.C. 660). Throughout this Title, the term "child support" has a specific meaning—the obligation of parents to support their children.[7]

In contrast to this repeated use of "child support" to refer to parental payments in Title IV, the Social Security Act does not use "child support payments" to refer to child's insurance benefits, or to any other kind of social security benefits. Indeed, under Title II, a child must, in certain circumstances, establish the level of a parent's previous "support" in order to qualify for the government-provided "child's insurance benefit." See, *e.g.*, 42 U.S.C. 402(d)(4) and (8). The fact that child's insurance benefits are intended to *replace* parental support after a parent has died, become disabled, or retired, *Califano* v. *Jobst*, 434 U.S. 47, 52 (1977); *Mathews* v. *Lucas*, 427 U.S. 495, 507 (1976), does not mean that the child's insurance benefits themselves are encompassed in the ordinary usage of the term child support payments, and certainly nothing in Title II indicates that the terms are interchangeable.

The language of the family income requirement itself also reflects this distinction between child support payments and Social Security benefits. The family income requirement and the child support payment disregard are both part of Section 2640 of DEFRA—Sections 2640(a) and 2640(c), respectively. While the disregard refers to

[7] This usage is consistent with the dictionary definition. See *Black's Law Dictionary* 217 (5th ed. 1979) ("child support" defined as the "legal obligation of parents to contribute to the economic maintenance, including education of their children; enforceable in both civil and criminal contexts").

"child support payments" (§ 2640(c), 98 Stat. 1146), the family income requirement states that the requirement applies "in the case of benefits provided under title II" (§ 2640(a), 98 Stat. 1145). In referring to payments under the Title II OASDI program, then, the statute explicitly refers, not to "child support payments," but to "benefits."

Additionally, the problem of obtaining "child support" from absent parents has frequently been the subject of intense congressional attention, and the term "child support" in this context has always referred to the problem of parental payments. See, e.g., FSA, Tit. I, 102 Stat. 2343-2356 ("Child Support and Establishment of Paternity"); Pub. L. No. 98-378, 98 Stat. 1305 ("Child Support Enforcement Amendments of 1984"). Significantly, the latter of these statutes became law less than one month after the enactment of DEFRA, and its use of the term "child support" to refer to parental payments is clear. See, *e.g.*, Section 23(a)(2), 98 Stat. 1329 ("The Congress finds that * * * there is a critical lack of child support enforcement, which Congress has undertaken to address through the child support enforcement program."). Thus, the general statutory usage of the term is directly contrary to the court of appeals' interpretation.

2. The court of appeals' interpretation is also contrary to the purpose of the $50 disregard, as suggested by the available legislative history. Although the phrase "child support payments" is not specifically addressed in the committee reports accompanying the enactment of DEFRA, a similar provision had been adopted by Congress in 1974.[8] The legislative history of that provision explicitly stated that the purpose of the disregard was to provide an incentive for obtaining child support payments

[8] That provision, enacted for a fifteen-month trial period, specified that 40% of the first $50 of monthly "child support" payments collected by the State pursuant to the assignment of support rights would be passed through and disregarded in AFDC eligibility determinations. Social Services Amendments of 1974, Pub. L. No. 93-647, § 101(a), 88 Stat. 2356.

from noncustodial parents. S. Rep. No. 1356, 93d Cong., 2d Sess. 52 (1974). This purpose has no application to child's insurance benefits, which are paid automatically by the federal government.

The Fourth Circuit rejected the relevance of this prior history, stating that "the intent of one Congress cannot be inferred from the activities of another Congress." App., *infra*, 9a. However, when Congress enacts a massive omnibus statute like DEFRA, and adopts specific provisions which are patterned after earlier enactments, it is reasonable to assume, absent some indication to the contrary, that the new provision is designed to further the same purpose as its forerunner. This is especially true where the proposition involves a highly specialized subject matter—such as the meaning of an AFDC disregard for "child support payments."

The distinctions offered by the court of appeals between the situation confronting Congress in 1974 and the situation confronting Congress in 1984 are also unpersuasive. The court's basic contention—that legislative actions to require family cooperation and improve state incentives for locating delinquent parents had "substantially eviscerated" the justification for the disregard as a parental payment incentive (App., *infra*, 10a)—is belied by the repeated congressional findings that nonpayment of child support by noncustodial parents remains a grave national problem. See, *e.g.*, Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, § 23(a), 98 Stat. 1329; H.R. Rep. No. 159, 100th Cong., 1st Sess. 40 (1987).

Finally, the court of appeals failed to address a recent congressional amendment that clarifies the meaning of the disregard in a manner that substantially supports the Secretary's interpretation of the term "child support payments." Although subsequent congressional statements pose special problems of analysis and interpretation, see *United States* v. *Price*, 361 U.S. 304 (1960), subsequent congressional *enactments* carry "considerable retrospective weight." *Heckler* v. *Turner*, 470 U.S. 184, 211 (1985). See also *South Carolina* v. *Regan*, 465 U.S. 367, 378-379 n.17 (1984). In October 1988, Congress amended the disregard and pass-through provisions. FSA § 102, 102 Stat. 2346. The amendment clarifies that the disregard applies to child support payments from *absent* parents if the payment was made in the month when due. H.R. Conf. Rep. No. 998, 100th Cong., 2d Sess. 98 (1988).[9] By indicating that disregard and pass-through provisions apply to payments from an "absent parent" (see notes 1, 2, *supra*), the amendments lend considerable support to the Secretary's contention that Congress did not contemplate that the disregard would apply to other payments. Despite the submission of a post-argument

[9] Both the House and Senate Committee reports stated that the change was intended as a clarification. H. R. Rep. No. 159 100th Cong., 1st Sess. 73 (1987); S. Rep. No. 377, 100th Cong., 2d Sess. 17 (1988). The Senate Committee report noted that the Committee viewed the amendment as reflecting "the original intent" (*id.* at 17), that "differences of interpretation may exist" (*ibid.*), and that "[t]he Committee does not intend that an inference should be drawn from the enactment of this provision or its effective date as to the meaning of the law as previously in effect" (*ibid.*). The Senate report's reference is apparently to a dispute over the applicability of the disregard to late parental child support payments. See, *e.g.*, *Wilcox* v. *Ives*, 864 F.2d 915 (1st Cir. 1988) (invalidating 45 C.F.R. 302.51(b)(1) because it prohibits pass-through for multiple payments).

memorandum by the government addressing the amendment, the court of appeals did not address, or even acknowledge, this change.

3. The court of appeals failed to give appropriate deference to the Secretary's administrative interpretation. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984).[10] Despite its acknowledgement that "Congress has offered no answer to this question" (App., *infra*, 8a-9a), the court of appeals failed to defer to the interpretation provided by the agency charged by Congress with the administration of the AFDC program. Cf. *Lewis* v. *Martin*, 397 U.S. 552, 559 (1970) ("[w]e give HEW the deference due the agency charged with the administration of the [Social Security] Act" in AFDC case); *Rosado* v. *Wyman*, 397 U.S. 397, 415 (1970) (HEW's construction of AFDC provision "is entitled to weight as the attempt of an experienced agency to harmonize an obscure enactment with the basic structure of a program it administers").[11]

In response to DEFRA, the Secretary promulgated regulations to implement the changes to the AFDC program. 49 Fed. Reg. 35,586-35,606 (1984). The Secretary established a procedure for state agencies to follow in forwarding the first $50 of parental support payments to a family (45 C.F.R. 302.51(b)(1)), and required that $50 per

[10] See also *Young* v. *Community Nutrition Institute*, 476 U.S. 974, 980-981 (1986); *Chemical Manufacturers Ass'n* v. *NRDC*, 470 U.S. 116, 125 (1985).

[11] In 1979, HHS replaced the Department of Health, Education and Welfare (HEW) as the federal agency administering the AFDC program. Department of Education Organization Act, Pub. L. No. 96-88, Tit. V, § 509(b), 93 Stat. 695; 20 U.S.C. 3508(b).

month of the child support collections be excluded from AFDC eligibility and assistance determinations (45 C.F.R. 232.20(a) and (d)). The Secretary did not, however, promulgate any regulations to apply the $50 disregard to any form of payments other than parental support payments, such as child's insurance benefits. See 49 Fed. Reg. 35,589-35,590, 35,604-35,605 (1984).[12] The Secretary thus interpreted DEFRA and determined that the child support disregard applied to parental child support payments; that interpretation was entitled to the deference accorded the agency charged with interpreting and administering a complex statute.[13]

4. The court of appeals also relied on concerns about the constitutionality of the disregard. App., *infra*, 12a. However, a congressional determination to disregard the first $50 of child support payments from noncustodial parents, but not child's insurance benefits, easily passes constitutional muster. The evident purpose of providing that the first $50 of child support payments will not be counted in determining eligibility for AFDC benefits was to help secure the cooperation of beneficiaries in the collection of support payments from noncustodial parents and to provide a payment incentive for the noncustodial parents. No such incentives are needed with respect to child's insurance benefits, whose payment is guaranteed by the federal government. In view of the fact that this kind of "statutory discrimination will not be set aside if any

[12] An absent parent's spousal support payments are included in the disregard. See note 3, *supra*; 53 Fed. Reg. 21,642 (1988).

[13] Although the dissent in the Eighth Circuit case stated that the Secretary's interpretation was not entitled to deference because it was "neither consistent nor longstanding," *Todd* v. *Norman*, 840 F.2d at 614 (Lay, C.J., dissenting), the majority concluded that the Secretary "has consistently maintained that only child support payments assigned to the state trigger the disregard." *Id.* at 612.

state of facts reasonably may be conceived to justify it" (*Bowen* v. *Gilliard*, 483 U.S. at 601 (internal quotations omitted)), this difference is surely sufficient to sustain limiting the disregard to parental support payments. The problem of nonpayment of child support remains a congressional priority.[14] Despite the court of appeals' pessimism about the efficacy of a $50 incentive in light of subsequent developments, it was clearly permissible for Congress to decide that a further incentive to collection and payment of parental support payments was needed. See generally *Dandridge* v. *Williams*, 397 U.S. 471 (1970).

The court of appeals also observed that this Court, in *Bowen* v. *Gilliard*, found that the purpose of the disregard was to mitigate the hardship of the family income requirement, and that such a purpose is equally applicable to child's insurance benefits. App., *infra*, 10a. But nothing in *Bowen* v. *Gilliard* suggests that mitigating hardship is the sole purpose of the disregard, and nothing in that opinion is inconsistent with a view that one aspect of the disregard was an effort to encourage child support payments from noncustodial parents. The payments involved in *Gilliard* were child support payments from noncustodial parents, and thus this Court had no occasion to consider possible differences between those payments and child's insurance benefits. The passage quoted by the court of appeals described the operation of the disregard in the context

[14] See, *e.g.*, Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, § 23(a), 98 Stat. 1329; 134 Cong. Rec. S7651 (daily ed. June 13, 1988) (statement of Sen. Bentsen) ("If we want to reform the welfare system, let us start with an all-out effort to collect child support. The Congress enacted strong legislation in 1975 and in 1984, but despite that legislation only a small fraction of children who live with single parents receive the full credit as awarded to them by the courts. Many receive nothing at all.").

before the Court; it clearly was not a holding about the sole purpose of the disregard, or its scope.

5. Resolution of the issue presented by this case is essential to the uniform administration of the AFDC program. As the court of appeals recognized, its decision squarely conflicts with the Eighth Circuit's decision in *Todd* v. *Norman*, 840 F.2d 608 (1988). In *Todd*, the Eighth Circuit explicitly rejected the claim that "Congress intended the words 'child support payment' to apply to Child's Insurance Benefits." *Ibid*. The Eighth Circuit and the Fourth Circuit disagree on the purpose of the disregard (840 F.2d at 612; App., *infra*, 10a), on the weight to be given the prior disregard (840 F.2d at 611-612; App., *infra*, 9a-10a), on the deference to be given the Secretary's interpretation (840 F.2d at 612; App., *infra*, 10a-12a); and on the rationality of limiting the disregard to parental support payments (840 F.2d at 612; App., *infra*, 12a).[15] State courts have issued similarly conflicting opinions.[16]

The issue also has significant fiscal implications. HHS estimates that the court of appeals' decision, if applied nationwide, would require increased annual expenditures of close to $44 million in federal and state outlays.[17] The

[15] See also *Jackson* v. *Mullany*, 708 F. Supp. 483 (N.D.N.Y. 1989) (disregard includes child's insurance benefits); *Davis* v. *Sallee*, No. Civ. 4-86-27 (E.D. Tenn. Oct. 10, 1986) (same); *McBee* v. *Sallee*, No. Civ. 2-86-103 (E.D. Tenn. Nov. 26, 1986) (same).

[16] Compare *Baylor* v. *New Jersey Dep't of Human Services*, 235 N.J. Super. 22, 561 A.2d 618 (1989) (disallowing disregard for child's insurance benefits) with *Ledbetter* v. *Foster*, 180 Ga. App. 696, 350 S.E. 2d 31 (1986) (permitting disregard for child's insurance benefits). See also *In re D'Antignac*, No. 16444-86 (N.Y. Sup. Ct. Oct. 3, 1986) (permitting disregard for child's insurance benefits).

[17] In 1986, almost 460,000 AFDC families received unearned income (U.S. Dep't of Health and Human Services, Family Support Administration, *Characteristics and Financial Circumstances of AFDC Recipients 1986*, at 77; 15.9% of these AFDC families—or approximately 73,000—received social security benefits (*ibid.*). Although HHS does not separate child's insurance benefits from other social security benefits, the Department believes that almost all of the families in this category received child's insurance benefits. A disregard of $50 per month amounts to $600 per year for each recipient family. The cost of the disregard for 73,000 families at $600 per year is $43.8 million annually.

Fourth Circuit's decision ~~opinion~~ may also have an impact in other areas. At least two cases are now pending in which the claim has been made that veterans' benefits are similarly entitled to the $50 disregard.[18]

In view of the conflicting interpretations by the courts of appeals and of the recurring importance of this issue, further review is clearly warranted at this time.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[18] *Trusty* v. *Cullen*, No. 88-C-0322 (E.D. Wisc.); *Green* v. *Sullivan*, No. Civ. 89-0529A (W.D.N.Y.).

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-2530

ELIZABETH STROOP; MELISSA LAM, BY HER NEXT FRIEND ELIZABETH STROOP; BRETT LAM, BY HIS NEXT FRIEND ELIZABETH STROOP; JAMIE STROOP, BY HER NEXT FRIEND ELIZABETH STROOP; GENEVA POWERS; CRYSTAL MCCLANAHAN, BY HER NEXT FRIEND GENEVA POWERS; DOROTHY BROWN; ROBERT LEE TURNER, BY HIS NEXT FRIEND DOROTHY BROWN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLEES

and

KAREN B. CARTER; RAGENE CARTER, BY HER NEXT FRIEND KAREN B. CARTER; PAULA JONES; CORY P. JONES, BY HIS NEXT FRIEND PAULA JONES; DAVID L. JONES, PLAINTIFFS

v.

OTIS R. BOWEN, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT-APPELLANT

and

LARRY D. JACKSON, COMMISSIONER OF THE VIRGINIA DEPARTMENT OF SOCIAL SERVICES, DEFENDANT

CENTER FOR LAW AND SOCIAL POLICY, AMICUS CURIAE

No. 88-2538

ELIZABETH STROOP; MELISSA LAM, BY HER NEXT FRIEND ELIZABETH STROOP; BRETT LAM, BY HIS NEXT FRIEND ELIZABETH STROOP; JAMIE STROOP, BY HER NEXT FRIEND ELIZABETH STROOP; GENEVA POWERS; CRYSTAL MCCLANAHAN, BY HER NEXT FRIEND GENEVA POWERS; DOROTHY BROWN; ROBERT LEE TURNER, BY HIS NEXT FRIEND DOROTHY BROWN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLANTS

and

KAREN B. CARTER; RAGENE CARTER, BY HER NEXT FRIEND KAREN B. CARTER; PAULA JONES; CORY P. JONES, BY HIS NEXT FRIEND PAULA JONES; DAVID L. JONES, PLAINTIFFS

v.

LARRY D. JACKSON, COMMISSIONER OF THE VIRGINIA DEPARTMENT OF SOCIAL SERVICES; OTIS R. BOWEN, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANTS-APPELLEES

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Appeals from the United States District Court for the Eastern District of Virginia, at Richmond. Richard L. Williams, District Judge (CA-86-398)

[Filed Mar. 28, 1989]

Before: MURNAGHAN and CHAPMAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

BUTZNER, Senior Circuit Judge:

In this class action, custodial parents receiving aid to families with dependent children (AFDC) appeal from the district court's grant of summary judgment to defendants, the Secretary of the Department of Health and Human Services and the Commissioner of the Virginia Department of Social Services (collectively, the Secretary). The district court upheld the Secretary's interpretation of federal statutes and regulations requiring applicants for AFDC to include, for the purpose of determining family income, brothers and sisters living in the same household who receive Title II social security payments.

The Secretary cross-appeals the district court's grant of summary judgment to the parents, requiring the Secretary to disregard as income the first $50 of the Title II social security benefits.

We affirm on both issues.

I

Plaintiffs are custodial parents who sue in behalf of their children who do not share the same father. In each case, some of the children in the household receive social security payments under Title II of the Social Security Act because of the insured status of their disabled or deceased fathers. Other children in the household receive AFDC only. The custodial parent in each case is the representative payee of the Title II payments, and the applicable statute provides that the representative payee must use the payments for the "use and benefit" of the beneficiary. Failure to do so will result in criminal prosecution. 42 U.S.C. § 407(e). The statute also contains an "anti-alienation" provision, 42 U.S.C. § 407(a), barring transfer of the right to receive future payments and exempting all payments from attachment, garnishment, and other legal process.

Before 1984, a family applying for AFDC was not required to include all resident family members but could exclude in its application family members who received support from other sources. As part of the Deficit Reduction Act of 1984 (DEFRA), Congress amended the AFDC program to require that a family's eligibility for benefits must take into account the income of parents, brothers, and sisters living in the same home.[1]

The Secretary promulgated regulations which have been interpreted to require inclusion of Title II social security payments in the family income for AFDC purposes.[2] In this case, interpreting the amendment to include Title II

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[1] The amendment in question requires a state plan to:

> provide that in making the determination under paragraph (7) [which sets forth the calculation for eligibility] with respect to a dependent child and applying paragraph (8) [which delineates types of income that are to be disregarded], the State agency shall (except as otherwise provided in this part) include:
>
> (A) any parent of such child and
>
> (B) any brother or sister of such child, if such brother or sister meets the conditions described in clause (1) and (2) of section 606(a) [which defines dependent child], if such parent, brother, or sister is living in the same home as the dependent child, and any income of or available for such parent, brother or sister shall be included in making such determination and applying such paragraph with respect to the family (notwithstanding Section 204(j) [allowing for payments to representative payees] in the case of benefits provided under Title II);

42 U.S.C. § 602(a)(38).

[2] The regulations provide in pertinent part:

> (A) State plan requirements . . .
>
> (1) . . .
>
> (vii) For AFDC only, in order for the family to be eligible, an application with respect to a dependent child must also include, if living in the same household and otherwise eligible for assistance:
>
> (A) . . .
>
> (B) Any blood-related or adoptive brother or sister.

45 C.F.R. § 206.10(a)(1)(vii)(1987).

social security payments will result in substantial diminution of AFDC benefits to each named plaintiff and, in one instance, the elimination of AFDC eligibility altogether.

II

The parents assert that inclusion of social security payments in the AFDC calculation violates the "anti-alienation" and representative payee provisions of Title II of the Social Security Act.

We join the Eighth, Ninth, and Eleventh Circuits in rejecting the parents' argument. *See* Gorrie v. Bowen, 809 F.2d 508, 517 (8th Cir. 1987), *cited with approval in* Bowen v. Gilliard, 107 S. Ct. 3008, 3013 n.5 (1987); Creaton v. Bowen, 826 F.2d 6 (9th Cir. 1987); Oliver v. Ledbetter, 821 F.2d 1507 (11th Cir. 1987) (addressing representative payee provision only). We adopt the court's reasoning in *Gorrie*:

> The anti-alienation provision imposes a broad bar against the use of any legal process to reach Social Security benefits. The Secretary's regulation does not subject Title II benefits to legal process, however, nor does it result in an assignment or transfer of benefits. It requires only that Title II benefit recipients apply for AFDC and have their incomes included in the family filing unit. This does not constitute a use of legal process to garnish or attach benefits.

Gorrie, 809 F.2d at 517.

Similarly, the parents' contention that inclusion of social security payments violates the representative payee provision is without merit. The parents suggest that including social security payments in family income forces the representative payees to violate their statutory duties by using Title II payments for family members other than the beneficiary. The Supreme Court rejected this argument in the context of child support payments from noncustodial parents and the Court's reasoning is instructive here:

> [T]he simple inclusion of support income in the benefit calculation [has no] legal effect on the child's right to have it used for his or her benefit. To the extent that a child has the right to have the support payments used in his "best interest," he or she fully retains that right. . . .
>
> [I]t is instructive to ask what would happen to the support payments if there were no AFDC program at all. In that case, it would appear that custodial parents would have to use a much greater portion of the support payments to sustain the family unit, since it could hardly be deemed in the child's best interest for his custodial parent and siblings to have no funds whatsoever.

Bowen v. Gilliard, 107 S. Ct. 3008, 3019-20 & n.20 (1987).

The representative payee provision requires that the funds be used for the "use and benefit" of the beneficiary. Consistent with *Gilliard,* we hold that requirement does not preclude use of the funds for common household expenses typically shared by all household members, for the child is nonetheless benefited by such use. *See Gilliard,* 107 S. Ct. at 3016 n.14. Nor can it be said that spending all of the funds on the child recipient would benefit the recipient if to do so would leave brothers and sisters impoverished.

We also concur with the eighth circuit that Congress intended § 602(a)(38) to be enforced notwithstanding the representative payee provision of Title II. Congress expressly referred to § 405(j), which governs the certification of representative payees and contains the use and benefit restriction. Congress's reference to § 405(j) suggests that it intended to reconcile any possible incongruence between the implementation of section 602(a)(38) and section 405(j). It follows then that a representative payee will not be subject to criminal sanctions for including Title II payments in the family income. *See Gorrie,* 809 F.2d at 518.

The Secretary's interpretation of the DEFRA amendment accords with legislative history. The Senate Report states that § 602(a)(38) would "end the present practice whereby families exclude members with income in order to maximize family benefits and will ensure that the income of family members who live together and share expenses is recognized and counted as available to the family as a whole." S. Rep. No. 494, 97th Cong., 2d Sess. 47, *reprinted in* 1982 U.S. Code Cong. & Admin. News 781, 823.

The parents claim that Congress rejected the Secretary's interpretation in 1986. Specifically, the Senate proposed an amendment to DEFRA as part of the Tax Reform Act of 1986 which would have removed all doubt that Title II payments were to be included in determining a family's AFDC eligibility. *See* S. Rep. No. 313, 99th Cong., 2d Sess. 1075 (1986). But the House conferees did not accept this amendment.

We do not subscribe to the parents' theory. The Conference Committee Report specifically stated that "the agreement does not include that portion of the Senate amendment concerning Title II benefits and certain child support payments. No inference is intended with regard to

current federal regulations implementing Section 402(a)(38) of the Social Security Act [42 U.S.C. § 602(a)(38)]." H.R. Conf. Rep. No. 841, 99th Cong., 2d Sess. 854, *reprinted in* 1986 U.S. Code Cong. and Admin. News 4942. The Secretary's regulation challenged in this suit was in effect in 1986. We conclude that the conferees intended that their refusal to adopt the Senate amendment should not be construed as a disagreement with the Secretary's regulations interpreting the DEFRA amendment. *Cf.* National Muffler Dealers Assoc. v. United States, 440 U.S. 472, 486 (1979).

We hold that the Secretary's interpretation of the DEFRA amendment to the AFDC program is reasonable, and we affirm the district court's grant of summary judgment.

III

The Secretary cross-appeals the district court's grant of summary judgment holding that the Secretary's refusal to disregard as income the first $50 of Title II social security child benefits is not authorized by 42 U.S.C. § 602(a)(8)(A)(vi). The statutory provision in question states:

> . . . in making the [eligibility] determination under paragraph (7), the State agency . . . (vi) shall disregard the first $50 of any child support payments received in such month with respect to the dependent child or children in any family applying for or receiving aid to families with dependent children (including support payments collected and paid to the family under §457(b)) [42 U.S.C. § 657(b)].

42 U.S.C. § 602(a)(8)(A)(vi). Resolution of this issue turns upon the definition of child support payments. The question is whether social security payments are child support payments within the meaning of § 602(a)(8)(A)(vi). Con-

gress has offered no answer to this question, and the Secretary has not issued a regulation pertaining to it.

In construing legislation, it is our duty to provide ordinary meaning to ordinary words. Burns v. Alcala, 420 U.S. 575, 580-81 (1975). Moreover, "[i]t is well established that our task in interpreting separate provisions of a single Act is to give the Act 'the most harmonious, comprehensive meaning possible' in light of the legislative policy and purpose." Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609, 631-32 (1973). Finally, if one among alternative constructions would involve serious constitutional difficulties that interpretation should be rejected in favor of another. United States v. Clark, 445 U.S. 23, 33-34 (1980); United States v. Harriss, 347 U.S. 612, 618 n.6 (1954). With these principles of statutory construction in mind, we address the Secretary's arguments.

In contending that child support payments do not include social security payments, the Secretary relies on the legislative history of a predecessor statute. Congress initially created the $50 disregard in 1974 to provide an incentive to a custodial mother to obtain child support from the child's father. *See* S. Rep. No. 1356, 93rd Cong., 2d Sess. 23, *reprinted in* 1974 U.S. Code Cong. & Admin. News 8133, 8155.

It is axiomatic that the intent of one Congress cannot be inferred from the activities of another Congress. United States v. Price, 361 U.S. 304, 313 (1960). In 1974, AFDC recipient cooperation was not a prerequisite to receiving benefits. Also, at that time social security payments were not a factor in determining a family's eligibility for AFDC, so there was no occasion for Congress to consider whether the disregard should also apply to such payments. In 1984 when the current provision was adopted, cooperation was a prerequisite, and AFDC recipients had existing incentives to cooperate in ensuring that child support payments

were made. Moreover, amendments to 42 U.S.C. § 658 have enhanced the states' incentives for tracking down nonresident parents who are delinquent in making child support payments. The Secretary's argument that the $50 disregard serves as a financial impetus is substantially eviscerated by legislative acts of the past 14 years, and it is unsupported by the legislative history of the current provision.

The only pronouncement about the purpose of the current disregard provision has come from the Supreme Court which reasoned that the disregard of the first $50 paid by a father serves to mitigate the burden of the changes wrought by the DEFRA amendments. Bowen v. Gilliard, 107 S. Ct. 3008, 3013 (1987).[3] Although the question of Title II payments was not before the Court, it is apparent that disregard of the first $50 of social security payments, which are received in lieu of payments made by a father, serves the same purpose.

The Secretary suggests that Congress did view child support and social security benefits as distinct items because it noted that under the law in effect before § 602(a)(38), "a family might choose to exclude a child who is receiving social security or child support payments." S. Rep. No.

[3] *Gilliard* upheld the constitutionality of the DEFRA amendment with respect to payments made by a noncustodial parent. Speaking of the $50 disregard, the Court said:

> Because the 1984 amendments forced families to include in the filing unit children for whom support payments were being received, the practical effect was that many families' total income was reduced. The burden of the change was mitigated somewhat by a separate amendment providing that the first $50 of child support collected by the State must be remitted to the family and not counted as income for the purpose of determining its benefit level. (footnotes omitted)

107 S. Ct. at 3013.

494, 97th Cong., 2d Sess. 47, *reprinted in* 1982 U.S. Code Cong. & Admin. News 781, 823. The Secretary reasons that if Congress distinguished between child support payments and social security payments in discussing their inclusion in "income," then Congres arguably distinguished between them for purposes of the income disregard provision.

This argument is not without force, *see* Todd v. Norman, 840 F.2d 608, 611 (8th Cir. 1988) (no disregard for social security payments), but we conclude that the suggested inference is simply too tenuous to support the Secretary's interpretation which is not only irrational but also implicates serious equal protection concerns.[4]

We perceive no distinction between support derived directly from a father's wages and support provided indirectly through Title II payments. In both cases, it is the father, a wage earner, whether current or past, who provided the support. The money to support the child comes directly through the father or indirectly through insurance he earned when working. In each instance the $50 disregard would serve the purpose the Supreme Court identified in *Gilliard*, 107 S. Ct. at 3013.

In Ledbetter v. Foster, 350 S.E.2d 31, 33 (Ga. App. 1986), the only state court decision of which we are aware that has addressed this issue, the court defined the term "child support" in 42 U.S.C. § 602(a)(8)(A)(vi) to include social security payments. A number of other state courts have held that an absent parent's child support obligation is fulfilled by insurance benefits paid by social security on behalf of the parents. *See, e.g.*, Binns v. Maddox, 57 Ala. App. 230, 327 So. 2d 726 (1976); Children & Youth Servs.

[4] The parents challenged the Secretary's interpretation on equal protection grounds, but the district court based its decision on statutory construction grounds only. Because we affirm, we find no occasion to decide the constitutional issue.

v. Chorgo, 341 Pa. Super. 512, 491 A.2d 1374 (1985); Justice v. Scruggs, 286 S.C. 165, 332, S.E.2d 106 (1985). Moreover, Virginia recognizes Title II benefits as child support by statute. Section 20-61 of the Virginia Code imposes criminal sanctions on absent parents who fail to support their minor children but exempts parents of children who have qualified for and are receiving benefits under a federal aid to the permanently and totally disabled. Va. Code Ann. § 20-61 (Repl. Vol. 1983).

AFDC families with children who receive social security payments are burdened by the DEFRA amendments no less than families with children who receive payments from noncustodial fathers. No rational basis exists for according one class of families the mitigating benefit of the disregard provision while depriving another arguably indistinguishable class of families of the same benefit. *See* Todd v. Norman, 840 F.2d at 616 (Lay, C.J., dissenting). This sort of unreasoned distinction raises equal protection concerns. *See* Clark v. Jeter, 108 S. Ct. 1910, 1914 (1988). Interpretation of the statute to include child social security payments within the phrase "child support payments" is fair and reasonable and is in accord with the principle that:

> Federal statutes are to be so construed as to avoid serious doubt of their constitutionality. "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."

International Ass'n of Machinists v. Street, 367 U.S. 740, 749 (1961).

We therefore conclude that social security payments are entitled to the $50 disregard under § 602(a)(8)(A)(vi).

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action 86-0398-R

KAREN B. CARTER, ET AL., PLAINTIFFS

v.

OTIS R. BOWEN, ET AL., DEFENDANTS

[Filed Dec. 21, 1987]

MEMORANDUM OPINION

This class action suit is before the Court on the parties' cross motions for summary judgment. The plaintiffs challenge the constitutionality of federal regulations and the corresponding Virginia rules which purport to implement the changes made to the Aid to Families with Dependent Children program (AFDC) by section 2640(a) of the Deficit Reduction Act of 1984, codified at 42 U.S.C. § 602(a)(38). In light of the Supreme Court's decision in *Bowen v. Gilliard*, 483 U.S. ____, 97 L.Ed.2d 485 (1987), the plaintiffs voluntary dismissed the claims of children receiving child support payments and the claims of non-custodial parents who were paying child support. Two issues remain to be resolved. First, does the inclusion Title II Social Security benefits in the AFDC family unit's in-

come constitute an involuntary diversion of the benefits in violation of the anti-alienation provision of the Social Security Act and in violation of the Act's provisions governing the fiduciary duties of representative payees? Second, if the benefits are included in the family income for the purposes of AFDC, does the defendants' refusal to disregard as income the first $50 of their Social Security benefits violate both the Social Security Act and the Constitution's guarantees of Equal Protection under the law?

The Secretary's inclusion of Social Security benefits does not violate either the Act's anti-alienation provision or the representative payee provisions. DEFRA legally reduced government spending in this area. The Secretary did err, however, in refusing to allow families receiving Social Security benefits the same $50 remittance received by AFDC families paid child support.

Facts

As a part of its major effort to reduce the federal deficit through DEFRA, Congress amended AFDC to require that a family's eligibility for benefits must take into account the income of all parents, brothers and sisters living in the same home. *Gilliard* addressed the case of child support payments. The parties here address the case where a child receives benefits from the Child's Insurance Benefit Program which is part of Title II of the Social Security Act.

In this instance, the Stroop family is the representative plaintiff. Elizabeth Stroop and her three children live in Harrisburg. Two of her children, Melissa and Brett, each receive $319 per month in Social Security dependent's benefits because their father is disabled. The checks are made payable to Elizabeth Stroop as Representative Payee for Melissa and Bret, and she files a "Representative Payee

Report" with Social Security once a year to verify that the Social Security payments were either spent or saved for Melissa and Bret. Elizabeth and her youngest child Jamie, the daughter of her second husband, receive $231 each month from the AFDC program. Under the amended statute and regulations Melissa and Bret must apply for AFDC, and their Social Security benefits will be counted as part of the family's income. Consequently, the family will no longer qualify for AFDC. The family's income will drop from $869 to $638 (26%). Because of her duties as representative payee, Ms. Stroop also fears criminal prosecution if she uses the funds to support Jamie and herself.

The amendment in question states that a state plan shall:

> provide that in making the determination under paragraph (7) [which sets forth the calculation for eligibility] with respect to a dependent child and applying paragraph (8) [which delineates types of income that are to be disregarded], the State agency shall (except as otherwise provided in this part) include:
>
> > (A) any parent of such child and (B) any brother or sister of such child, if such brother or sister meets the conditions described in clause (1) and (2) of section 406(a) [which defines dependent child], if such parent, brother, or sister is living in the same home as the dependent child, and any income of or available for such parent, brother or sister shall be included in making such determination and applying such paragraph with respect to the family (notwithstanding Section 204(j) [allowing for payments to representative payees] in the case of benefits provided under Title II); . . .

42 U.S.C. § 602(a)(38)

The Anti-Alienation and Representative Payee Provisions

Plaintiffs argue that inclusion of Social Security benefits in the AFDC calculation violates the "anti-alienation" provision and the representative payee provisions of Title II of the Social Security Act.

The anti-alienation clause provides:

> The right of any person to any future payment under this Subchapter shall not be transferable or assignable, at law or equity, and none of the money paid or payable or rights existing under this Subchapter, shall be subject to execution, levy, attachment, garnishment or other legal process, or to the operation of any bankruptcy or insolvency law.

42 U.S.C. § 407(a)

The dispute focuses on the scope and meaning of "legal process." Courts in other circuits have narrowly construed the phrase and concluded: "The regulation resulted in an inclusion of income, not an assignment or transfer of Title II benefits." *Gorrie v. Bowen*, 809 F.2d 508, 517 (8th Cir. 1987). *See also Creaton v. Bowen*, 826 F.2d 6 (9th Cir. 1987); *Oliver v. Ledbetter,* 821 F.2d 1507 (11th Cir. 1987). Section 407(a) addresses instances where the beneficiary are deprived of the use and control of his Social Security benefits. The challenged amendments make no such depravation.

The plaintiffs' assert that § 407(a) applies not just to legal process, but to any involuntary transfers. They note that where Congress wants to waive the application of the anti-alienation provision, it usually does so by express reference. *See* 42 U.S.C. § 659(a) (providing for the garnishment of Social Security benefits for support purposes). Congress did not make such an express waiver in 42 U.S.C. § 602(a)(38).

Although the plaintiff's interpretation of the statute is plausible, the construction of the statute by the agency charged with its administration is entitled to considerable deference, and must be followed by the courts unless there are "compelling indications that [the agency interpretation] is wrong," *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 381 (1969), or that it is "demonstrably irrational." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980). By implication, the Secretary of Health and Human Services has decided that the anti-alienation provision does not apply. There is no evidence to suggest that this interpretation is wrong. Moreover, the plaintiffs do not cite any case law for the propositions that the provision applies to "involuntary transfers" and that the decision faced by the Social Security recipient, as difficult as it may be, rises to the level of an "involuntary transfer."

Plaintiffs also assert that the Secretary's interpretation of § 602(a)(38) conflicts with 42 U.S.C. § 408(e) which makes if a crime for a payee to use Title II payments for a purpose other than the "use and benefit" of the beneficiary. They argue that counting Title II benefits as available to the entire family forces the representative payees to use Title II benefits for family members other than the beneficiary, thus causing them to violate their representative duties. The Supreme Court in *Gilliard* rejected this argument in the context of child support payments, and the Court's reasoning is applicable here: "An assumption that child support payments to families receiving AFDC benefits are typically used for the entire family's needs is entirely reasonable. . . For the requirement that the support income be used for the 'benefit' of the child does not preclude its use for common expenses. Moreover, the custodial parent's duty to benefit the supported child is not necessarily served simply by spending more money on him or her than on other children living in

the same home." *Gilliard*, 483 U.S. at ____, 97 L.Ed.2d at 500 n.14. Also, section 602(a)(38) by its own terms is to be enforced notwithstanding the representative payee provisions of Title II. Congress made parenthetical reference to 42 U.S.C. § 405(j) which governs the certification of representative payees and contains the "use and benefit" restriction. The court agrees with the Eighth Circuit's determination that "Congress resolved the potential conflict by providing that the statutory obligations of the representative payee should not be applied to interfere with the operation of § 602(a)(38). It readily follows that the criminal sanctions of § 408(e) are unenforceable in such circumstances." *Gorrie v. Bowen*, 809 F.2d 508, 518 (8th Cir. 1987) (citations omitted).

$50 Disregard Provision

Under the defendants' current regulations the Government remits the first $50 of child support payments to the AFDC family but refuses to grant the same rebate to a family receiving Social Security benefits. The $50 disregard provisions provides:

> . . . in making the [eligibility] determination under paragraph (7), the State agency . . . (vi) shall disregard the first $50 of any child support payments received in such month with respect to the dependent child or children in any family applying for or receiving aid to families with dependent children (including support payments collected and paid to the family under § 457(b) [42 U.S.C. 657(b)]

42 U.S.C. § 602(a)(8)(A)

It is contradictory to treat Social Security benefits like child support for the purposes of including them in family income and then in another part of the same statute treat them differently from child support payments for the pur-

pose of excluding a family from a potential $50 rebate. Although DEFRA was designed to reduce government spending, the law does not empower the Secretary to make self-serving irrational distinctions. A family's eligibility for the $50 remittance should not turn upon the absent father's ability to work. For example, the law should not allow a family to receive the $50 rebate when a child is supported by a working father, but deny that family the rebate when the father becomes disabled and must provide the support indirectly through Social Security benefits. *See Davis v. Salee*, No. CIV-4-86-27 (E.D. Tenn. Oct. 10, 1986). There is no apparent rational justification for such a distinction.

The defendants' argue that in the case of child support payments, the $50 remittance is an incentive for the family to cooperate in the collection of child support. The Government bears the risk that the responsible parent will fail to pay child support and force the Government to pay the full AFDC amount without the benefit of an offset. The $50 disregard provides an incentive, argue the defendants, for the family to pressure the non-resident parent to make child support payments. No similar incentive is necessary for the AFDC family whose children receive Social Security benefits because there is no action the state can take to collect such benefits. *Todd v. Reagan*, Civil No. 85-300-A (S.D. Iowa December 22, 1986) appeal pending No. 87-1251 (8th Cir.)

No legislative history for § 602(a)(8)(A)(vi) exists to support the defendants' incentive argument. In *Todd v. Reagan*, supra, a case relied on by the defendants, the court referred to the legislative history of the predecessor of § 602(a)(8)(A)(vi), and determined that "the purpose of the disregard was to create a financial incentive to AFDC recipients to assist the state in collecting child support." *Id.* at 4. Not only is it improper to infer one Congress' intent from the activities of another Congress, *United States v. Price*, 361 U.S. 304, 313 (1960), but the legal requirements placed on the AFDC family have changed. In 1974 when the predecessor section was enacted recipient cooperation was not a requisite to receiving AFDC aid. In 1984, cooperation was a requisite, and the AFDC recipients had existing incentives to ensure that child support payments were made. Moreover, amendments to 42 U.S.C. § 658 have enhanced the states' incentives for tracking down non-resident parents who are delinquent in making child support payments. The argument that the $50 disregard provision provides a financial incentive has lost much, if not all, of its force in the intervening thirteen years.

The Supreme Court in *Gilliard* suggested that the purpose of the $50 disregard provision is to mitigate the family's reduction in benefits. In describing the 1984 DEFRA amendments, the Court wrote: "The burden of the change was mitigated somewhat by a separate amendment providing that the first $50 of child support collected by the state must be remitted to the family and not counted as income for the purpose of determining its benefit level." *Gilliard*, 483 U.S. at ____, 97 L.Ed.2d at 496-97. Since AFDC families with children supported by Social Security bear the same "burden of change" as do families with children supported by child support payments, Social Security families deserve the same benefit of mitigation provided by 42 U.S. § 602(a)(8)(A)(vi).

The defendants' also argue that if Social Security benefits fall within the meaning of the provision's "any child support," then all AFDC benefits are a form of "child support" and everyone should get the $50 remittance. The defendants fail to see the distinction between AFDC benefits—a welfare benefit which is set according to number of members in one's family—and child support

and Social Security benefits which are derived from the parent's earning capacity. For this reason, many states have considered Social Security benefits a type of "child support" *See e.g., Ledbetter v. Foster*, 350 S.E.2d 31 (Ga. App. 1986).

Although the construction of a statute by an agency charged with its administration is entitled to considerable deference, the Secretary's interpretation of § 602(a)(8)(A)(vi) appears to be "demonstrably irrational." *Ford Motor Credit Co.* v. *Milholin*, 444 U.S. 555, 565 (1980). The "any child support" language in 42 U.S.C. § 602(a)(8)(A)(vi) includes Social Security benefits paid to children of families receiving AFDC. To limit the phrase to only state ordered child support payments would be irrational. The applicability of the $50 disregard provision should not turn upon the health of the supporting parent. Rather the purpose of the provision is to mitigate the hardship imposed by the DEFRA amendments to the AFDC program. Whether the AFDC families include children receiving child support payments or Social Security benefits, the families suffer equally under the DEFRA amendments. Hence the families should also equally enjoy the same limited relief provided by the Act's disregard provision.

Having resolved the matter on the basis of statutory construction, the Court sees no need to address the Equal Protection argument.

Let the Court send a copy of this memorandum opinion to all counsel of record.

21 Dec 1987 /s/ Richard L. Williams
DATE RICHARD L. WILLIAMS
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action 86-0398

KAREN B. CARTER, ET AL., PLAINTIFFS

v.

OTIS R. BOWEN, ET AL., DEFENDANTS

[Filed Mar. 4, 1988]

MEMORANDUM OPINION

This matter is before the Court on the federal defendant Otis R. Bowen's motion to alter or amend the Court's December 21, 1987 judgment pursuant to Fed. R. Civ. P. 59(e). For the reasons set forth below, the defendant's motion is denied.

The federal defendant challenges the Court's interpretation of "child support payments" in 42 U.S.C. § 602(a)(8)(A)(vi) to include Social Security Children Insurance Benefits. Bowen contends that such Social Security benefits are not entitle to the benefit of the $50 disregard provision of the Deficit Reduction Act of 1984 (DEFRA). 42 U.S.C. § 602(a)(8)(A)(vi). Only child support payments collected by the states fall within the

parameters of this section, suggests Bowen. The Court expressly rejected this view in its earlier decision, noting:

> It is contradictory to treat Social Security benefits like child support for the purpose of including them in family income and then in another part of the same statute treat them differently from child support payments for the purpose of excluding a family from a potential $50 rebate. Although DEFRA was designed to reduce government spending, the law does not empower the Secretary to make self-serving, irrational distinctions. A family's eligibility for the $50 remittance should not turn upon the absent father's ability to work. For example, the law should not allow a family to receive the $50 rebate when a child is supported by a working father, but deny that family the rebate when the father becomes disabled and must provide the support indirectly through Social Security benefits. *See Davis v. Salee*, No. CIV-4-86-27 (E.D. Tenn. Oct. 10, 1986). There is no apparent rational justification for such a distinction.

Memorandum Opinion at 7.

The Government argues there are several rational justifications for treating child support payments differently from Social Security benefits. First, the $50 disregard and pass-through encourages the custodial parent to cooperate and identify for state authorities the non-custodial parent who should be paying child support. Second, the non-custodial parent is more likely to pay child support if he knows that his children will receive a $50 bonus for his cooperation. These incentives are not present where the Federal government pays Social Security benefits directly to the recipients.

Although there is no legislative history to the DEFRA amendments in question, the Government rests its argu-

ment on the legislative history of the predecessor of § 602(a)(8)(A)(vi). The earlier provision was enacted in 1974 and provided that 40% of the first $50 collected on the monthly support obligation would be paid to the family without affecting their AFDC eligibility. 42 U.S.C. § 647(a)(1) (1974). The disregard provision was enacted to encourage AFDC recipients' cooperation in the collection of child support payments. *See* Senate Report 93-1356, 93rd Cong., 2d Sess., *reprinted* at 1974 U.S. Code Cong. and Admin. News 8155.

Also as part of the 1974 amendments to the Social Security Act, all AFDC recipients were required to assign to the State any support rights they had in their own behalf or on behalf of their dependents who were also recipients of AFDC. They were also required to cooperate with the State in establishing and enforcing support obligations. Social Services Amendments of 1974, Pub. L. 93-647, section 101(a) et seq.

Hence in 1974, Congress created at least two means of improving parental support of AFDC recipients: the disregard provision and mandatory assignment and cooperation amendments. By the end of the next year, Congress in effect elected between the two means. The disregard provision was phased out, and the mandatory assignment and cooperation provisions remained. Therefore, when the disregard provision was reintroduced as part of DEFRA, the legal landscape of parental support for AFDC recipents was completely different from that in 1974. In 1974, recipient cooperation was not a requisite to receiving AFDC benefits. The assignment and cooperation provisions were enacted simultaneously with the disregard provision. By 1984, however, the assignment and cooperation requirements

had been in place for a decade and obviated the need for additional financial incentives for cooperation.[1]

There is absolutely no legislative history to support the federal defendant's view that Congress enacted the disregard provision in 1984 as an added incentive to the custodial parent to cooperate in identifying a parent from whom support payments could be obtained. Such incentives were well established in 1984. Similarly, the Government is correct in arguing that there is no legislative history supporting the Court's holding that the $50 disregard applies to Social Security benefits as well. The simple truth is that there is no legislative history to these DEFRA amendments.

Nonetheless, § 602(a)(8)(A)(vi) must be interpreted to include Social Security benefits to avoid an anomalous result that Congress could not have intended. The DEFRA amendments operate to change the income counting requirements for AFDC families. A family which includes children living in the same household that receive either child support payments or Social Security benefits must include those benefits in the family income for purposes of calculating eligibility for AFDC benefits. It is irrelevant for the purposes of calculating AFDC eligibility and benefits whether the $400 a child receives is child support or

[1] The Government correctly points out that the Court mistakenly relied on 42 U.S.C. § 658 as an example of states receiving increased incentives to track down parents who are delinquent in making child support payments. States' incentives under § 658 have in fact decreased since 1974. There are other areas, however, where states' incentives have increased to ensure that parents make child support payments. For example, if a state welfare agency is persistent and discovers the parent owing child support, the agency may be reimbursed for support payments from the seizure of that parent's federal tax refund. 42 U.S.C. § 664 (1982). *See Presley v. Regan*, 604 F.Supp. 609 (N.D.N.Y. 1985).

Social Security benefits. The $400 is still $400 in family income.

The law should be equally blind for the purposes of excluding these benefits from the family's income. Whether the $400 is child support or Social Security benefits should not matter for purposes of disregarding the first $50 of such income and passing it through to the family. If the DEFRA amendments were intended to distinguish between the sources of additional income to the family, the availability of the $50 disregard benefit would turn upon the health of the absent parent. As noted earlier, if the absent parent is healthy and provides child support, the family receives the benefit of the $50 disregard. If this same father, however, becomes disable, the family may well receive the same amount in monthly income but lose the benefit of the $50 disregard.

More likely, the DEFRA disregard provision was intended to mitigate the hardship caused some families by DEFRA's new definitions of family income. This conclusion is supported by the Supreme Court's statement in *Bowen v. Gilliard*: "The burden of [DEFRA] was mitigated somewhat by a separate amendment providing that the first $50 of child support collected by the state must be remitted to the family and not counted as income for the purposes of determining the benefit level." 483 U.S. __, 97 L.Ed.2d. 485, 496-97.

For these reasons, defendant Bowen's motion to alter or amend the Court's prior judgment is denied.

Let the Clerk send a copy of this final order to all counsel of record.

04 Mar. 1988 /s/ Richard L. Williams
Date RICHARD L. WILLIAMS
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

Civil Action 86-0398

KAREN B. CARTER, ET AL., PLAINTIFFS

v.

OTIS R. BOWEN, ET AL., DEFENDANTS

[Entered Dec. 21, 1987]

FINAL ORDER

This matter is before the Court on the parties' cross motions for summary judgment pursuant to Fed. R. Civ. P. 56 to determine the validity of the federal regulatoins and the corresponding Virginia rules which purport to implement the changes made to the Aid to Families with Dependent Children program by section 2640(a) of the Deficit Reduction Act of 1984, codified at 42 U.S.C. § 602(a)(38).

The plaintiffs' statutory and constitutional claims of children receiving child support payments and the claims of the non-custodial parents who are paying child support are voluntarily DISMISSED pursuant to Fed. R. Civ. P. 41(a)(2).

For the reasons stated in the accompanying memorandum opinion:

The portion of the defendants' summary judgment motion which addresses the inclusion of children receiving Title II Social Security benefits in the AFDC assistance unit is GRANTED. The portion of the plaintiffs' summary judgment motion which challenges the inclusion on statutory and constitutional grounds is DENIED.

The portion of the defendants' summary judgment motion which asks the Court to uphold the Secretary's refusal to disregard the first $50 of Social Security benefits paid to AFDC families pursuant to 42 U.S.C. § 602(a)(8)(A)(vi) is DENIED, and that part of the plaintiffs' summary judgment motion challenging the Secretary's interpretation of 42 U.S.C. § 602(a)(8)(A)(vi) is GRANTED.

The Temporary Restraining Order imposed by the Court's orders dated June 23 and July 2, 1986 is hereby VACATED.

Let the Clerk send a copy of this final order to all counsel of record.

21 Dec. 1987 — Date

/s/ Richard L. Williams
RICHARD L. WILLIAMS
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

Civil Action No. 86-0398

KAREN B. CARTER, ET AL., PLAINTIFFS

v.

OTIS R. BOWEN, ET AL., DEFENDANTS

[Entered Mar. 4, 1988]

FINAL ORDER

This matter is before the Court on the federal defendant Otis R. Bowen's motion to alter or amend the Court's December 21, 1987 judgment pursuant to Fed. R. Civ. P. 59(e).

For the reasons stated in the accompanying memorandum opinion, the defendant's motion is DENIED.

Let the Clerk send a copy of this final order to all counsel of record.

04 Mar. 1988 /s/ Richard L. Williams
Date RICHARD L. WILLIAMS
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 88-2530

ELIZABETH STROOP; MELISSA LAM, BY HER NEXT FRIEND ELIZABETH STROOP; BRET LAM, BY HIS NEXT FRIEND ELIZABETH STROOP; JAMIE STROOP, BY HER NEXT FRIEND ELIZABETH STROOP; GENEVA POWERS; CRYSTAL MCCLANAHAN, BY HER NEXT FRIEND GENEVA POWERS; DOROTHY BROWN; ROBERT LEE TURNER, BY HIS NEXT FRIEND DOROTHY BROWN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLEES

and

KAREN B. CARTER; RAGENE CARTER, BY HER NEXT FRIEND KAREN B. CARTER; PAULA JONES; CORY P. JONES, BY HIS NEXT FRIEND PAULA JONES; DAVID L. JONES, PLAINTIFFS

v.

OTIS R. BOWEN, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT-APPELLANT

and

LARRY D. JACKSON, COMMISSIONER OF THE VIRGINIA DEPARTMENT OF SOCIAL SERVICES, DEFENDANT

v.

CENTER FOR LAW AND SOCIAL POLICY, AMICUS CURIAE

No. 88-2538

ELIZABETH STROOP; MELISSA LAM, BY HER NEXT FRIEND ELIZABETH STROOP; BRET LAM, BY HIS NEXT FRIEND ELIZABETH STROOP; JAMIE STROOP, BY HER NEXT FRIEND ELIZABETH STROOP; GENEVA POWERS; CRYSTAL MCCLANAHAN, BY HER NEXT FRIEND GENEVA POWERS; DOROTHY BROWN; ROBERT LEE TURNER, BY HIS NEXT FRIEND DOROTHY BROWN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLANTS

and

KAREN B. CARTER; RAGENE CARTER, BY HER NEXT FRIEND KAREN B. CARTER; PAULA JONES; CORY P. JONES, BY HIS NEXT FRIEND PAULA JONES; DAVID L. JONES, PLAINTIFFS

v.

LARRY D. JACKSON, COMMISSIONER OF THE VIRGINIA DEPARTMENT OF SOCIAL SERVICES; OTIS R. BOWEN, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANTS-APPELLEES

v.

CENTER FOR LAW AND SOCIAL POLICY, AMICUS CURIAE

No. 88-2530

ELIZABETH STROOP; MELISSA LAM, BY HER NEXT FRIEND ELIZABETH STROOP; BRET LAM, BY HIS NEXT FRIEND ELIZABETH STROOP; JAMIE STROOP, BY HER NEXT FRIEND ELIZABETH STROOP; GENEVA POWERS; CRYSTAL MCCLANAHAN, BY HER NEXT FRIEND GENEVA POWERS; DOROTHY BROWN; ROBERT LEE TURNER, BY HIS NEXT FRIEND DOROTHY BROWN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLEES

and

KAREN B. CARTER; RAGENE CARTER, BY HER NEXT FRIEND KAREN B. CARTER; PAULA JONES; CORY P. JONES, BY HIS NEXT FRIEND PAULA JONES; DAVID L. JONES, PLAINTIFFS

v.

OTIS R. BOWEN, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANT-APPELLANT

and

LARRY D. JACKSON, COMMISSIONER OF THE VIRGINIA DEPARTMENT OF SOCIAL SERVICES, DEFENDANT

v.

CENTER FOR LAW AND SOCIAL POLICY, AMICUS CURIAE

No. 88-2538

ELIZABETH STROOP; MELISSA LAM, BY HER NEXT FRIEND ELIZABETH STROOP; BRET LAM, BY HIS NEXT FRIEND ELIZABETH STROOP; JAMIE STROOP, BY HER NEXT FRIEND ELIZABETH STROOP; GENEVA POWERS; CRYSTAL MCCLANAHAN, BY HER NEXT FRIEND GENEVA POWERS; DOROTHY BROWN; ROBERT LEE TURNER, BY HIS NEXT FRIEND DOROTHY BROWN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLANTS

and

KAREN B. CARTER; RAGENE CARTER, BY HER NEXT FRIEND KAREN B. CARTER; PAULA JONES; CORY P. JONES, BY HIS NEXT FRIEND PAULA JONES; DAVID L. JONES, PLAINTIFFS

v.

LARRY D. JACKSON, COMMISSIONER OF THE VIRGINIA DEPARTMENT OF SOCIAL SERVICES; OTIS R. BOWEN, SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES, DEFENDANTS-APPELLEES

v.

CENTER FOR LAW AND SOCIAL POLICY, AMICUS CURIAE

On Petition for Rehearing with Suggestion for Rehearing In Banc

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[Filed May 31, 1989]

ORDER

The appellant/cross appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Butzner with the concurrence of Judge Murnaghan and Judge Chapman.

For the Court,

/s/ John M. Greacen
JOHN M. GREACEN
Clerk

APPENDIX G

Statutory and regulatory provisions

42 U.S.C. 602 (Supp. V 1987):

State plans for aid and services to needy families with children; contents; approval by Secretary; records and reports; treatment of earned income advances

(a) Contents

A State plan for aid and services to needy families with children must –

* * * * *

(7) except as may be otherwise provided in paragraph (8) or (31) and section 615 of this title, provide that the State agency –

(A) shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid;

* * * * *

(8)(A) provide that, with respect to any month, in making the determination under paragraph (7), the State agency –

* * * * *

(vi) shall disregard the first $50 of any child support payments received in such month with respect to the dependent child or children in any family applying for or receiving aid to families with dependent children (including support payments collected and paid to the family under section 657(b) of this title); and

42 U.S.C. 657 (Supp. V 1987):

Distribution of proceeds

* * * * *

(b) Amount collected during any fiscal year beginning after September 30, 1976

The amounts collected as support by a State pursuant to a plan approved under this part during any fiscal year beginning after September 30, 1976, shall (subject to subsection (d) of this section) be distributed as follows:

(1) the first $50 of such amounts as are collected periodically which represent monthly support payments shall be paid to the family without affecting its eligibility for assistance or decreasing any amount otherwise payable as assistance to such family during such month;

* * * * *

The Family Support Act of 1988, Pub. L. No. 100-485, § 102, 102 Stat. 2346 provides:

DISREGARD APPLICABLE TO TIMELY CHILD SUPPORT PAYMENTS.

(a) IN GENERAL.—Section 402(a)(8)(A)(vi) of the Social Security Act is amended by striking "of any child support payments received in such month" and inserting in lieu thereof "of any child support payments for such month received in that month, and the first $50 of child support payments for each prior month received in that month if such payments were made by the absent parent in the month when due,".

(b) CONFORMING AMENDMENT.—Section 457(b)(1) of such Act is amended by striking "the first $50 of such amounts as are collected periodically which represent monthly support payments" and inserting in lieu thereof

"of such amounts as are collected periodically which represent monthly support payments, the first $50 of any payments for a month received in that month, and the first $50 of payments for each prior month received in that month which were made by the absent parent in the month when due,".

(c) EFFECTIVE DATE.—The amendments made by this section shall become effective on the first day of the first calendar quarter which begins after the date of the enactment of this Act.

42 U.S.C. 402 (1982 & Supp. V 1987):

Old-age and survivors insurance benefit payments.

* * * * *

(d) Child's insurance benefits

(1) Every child (as defined in section 416(e) of this title) of an individual entitled to old-age or disability insurance benefits, or of any individual who dies a fully or currently insured individual, if such child—

(A) has filed application for child's insurance benefits,

(B) at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time elementary or secondary school student and had not attained the age of 19, or (ii) is under a disability (as defined in section 423(d) of this title) which began before he attained the age of 22, and

(C) was dependent upon such individual—

(i) if such individual is living, at the time such application was filed,

(ii) if such individual has died, at the time of such death, or

(iii) if such individual had a period of disability which continued until he became entitled

to old-age or disability insurance benefits, or (if he has died) until the month of his death, at the beginning of such period of disability or at the time he became entitled to such benefits,

shall be entitled to a child's insurance benefit for each month, beginning with—

(i) in the case of a child (as so defined) of such an individual who has died, the first month in which such child meets the criteria specified in subparagraphs (A), (B), and (C), or

(ii) in the case of a child (as so defined) of an individual entitled to an old-age insurance benefit or to a disability insurance benefit, the first month throughout which such child is a child (as so defined) and meets the criteria specified in paragraphs (B) and (C) (if in such month he meets the criterion specified in paragraph (A)),

whichever is earlier, and ending with the month preceding whichever of the following first occurs—

(D) the month in which such child dies or marries,

(E) the month in which such child attains the age of 18, but only if he (i) is not under a disability (as so defined) at the time he attains such age, and (ii) is not a full-time elementary or secondary school student during any part of such month,

(F) if such child was not under a disability (as so defined) at the time he attained the age of 18, the earlier of—

(i) the first month during no part of which he is a full-time elementary or secondary school student, or

(ii) the month in which he attains the age of 19,

but only if he was not under a disability (as so defined) in such earlier month; or

(G) if such child was under a disability (as so defined) at the time he attained the age of 18, or if he was not under a disability (as so defined) at such time but was under a disability (as so defined) at such time but was under a disability (as so defined) at or prior to the time he attained (or would attain) the age of 22,—

(i) the termination month subject to section 423(e) of this title (and for purposes of this subparagraph, the termination month for any individual shall be the third month following the month in which his disability ceases; except that, in the case of an individual who has a period of trial work which ends as determined by application of section 422(c)(4)(A) of this title, the termination month shall be the earlier of (I) the third month following the earliest month after the end of such period of trial work with respect to which such individual is determined to no longer be suffering from a disabling physical or mental impairment, or (II) the third month following the earliest month in which such individual engages or is determined able to engage in substantial gainful activity, but in no event earlier than the first month occurring after the 36 months following such period of trial work in which he engages or is determined able to engage in substantial gainful activity),

or (if later) the earlier of—

(ii) the first month during no part of which he is a full-time elementary or secondary school student, or

(iii) the month in which he attains the age of 19,

but only if he was not under a disability (as so defined) in such earlier month.

Entitlement of any child to benefits under this subsection on the basis of the wages and self-employment income of an individual entitled to disability insurance benefits shall

also end with the month before the first month for which such individual is not entitled to such benefits unless such individual is, for such later month, entitled to old-age insurance benefits or unless he dies in such month. No payment under this paragraph may be made to a child who would not meet the definition of disability in section 423(d) of this title except for paragraph (1)(B) thereof for any month in which he engages in substantial gainful activity.

* * * * *

Section 232.20 of 45 C.F.R. provides in pertinent part:

Treatment of child support collections made in the Child Support Enforcement Program as income and resources in the Title IV-A Program.

(a) *Definition.* For purposes of this section, notwithstanding any other regulations in this chapter, support collections, monthly collections and support amounts for a month mean the assigned amount that the support enforcement agency collects from an absent parent or spouse on a monthly support obligation, less the disregarded sum under § 305.51(b)(1).

* * * * *

(d) The State plan must provide that the IV-A agency, on behalf of the IV-D agency, will promptly pay to the family the sum disregarded under § 305.51(b)(1).

Section 302.51 of 45 C.F.R. provides in pertinent part:

Distribution of support collections.

The State plan shall provide as follows:

* * * * *

(b) The amounts collected as support by the IV-D agency pursuant to the State plan for children and the parents of such children who are current recipients of aid under the State's title IV-A plan and for whom an assignment under § 232.11 of this title is effective shall be distributed as follows:

(1) Of any amount that is collected in a month which represents payment on the required support obligation for that month, the first $50 of such amount shall be paid to the family. This payment may not be used in determining the amount paid, if any, to the family in paragraph (b)(3) of this section. If the amount collected includes payment on the required support obligation for a previous month or months, the family shall only receive the first $50 of the amount which represents the required support obligation for the month in which the support was collected. If amounts are collected for one family which represent support payments from two or more absent parents, only the first $50 of the amount collected which represents the total required support obligation for the month in which the support was collected shall be paid to the family under this paragraph. No payment shall be made to a family under this paragraph for a month in which there is no child support collection.

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